

COURT'S ORDER WHETHER THE CASE IS OR IS NOT
APPROVED FOR REPORTING
{Chapter VIII, Rule 32(2)(b)}

Description of the case.

GOVERNMENT APPEAL NO. 1671 OF 2001
(Old No. 1353 of 1990)

State

...Appellants

Versus

kailash and **three others**

...Respondents

Sri Amit Bhatt, learned Addl. G.A. for the State/appellant
Sri Diwakar Chamoli, learned amicus curiae for Respondents

Approved for reporting.
Not approved for reporting

Date: June 5, 2007

(Dharam Veer J.)

RESERVED JUDGMENT

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

**GOVERNMENT APPEAL No. 1671 of 2001
(Old No. 1353 of 1990)**

The State

...Appellant

Versus

1. Kailahs S/o Sukh Nandan R/o Indresh Nagar, Jatiya Mohall, P.S. Kotwali, Dehradun
2. Vijai Prakash alias Bijji S/o chaman Lal R/o Khurbura Mohalla, P.S. Kotwali, Dehradun
3. Arun alias Gullu S/o Babu Ram R/o Khuni Gali, Jhanda Bazar, P.S. Kotwali, Dehradun
4. Kaloo alias Ramesh

.... Respondents

Dated: June 05, 2007

Sri Amit Bhatt, learned Addl. G.A. for the State/appellant
Sri Diwakar Chamoli, learned amicus curiae for Respondent Nos. 1 and 2

**Coram: Hon'ble J.C.S. RAWAT, J.
Hon' ble DHARAM VEER, J.**

PER HON'BLE DHARAM VEER, J.

This appeal, preferred under Section 378(1) of Code of Criminal Procedure 1973 (hereinafter to referred as Cr.P.C.), is directed against the judgment and order dated 04.04.1990 passd by Additional Sessions Judge, Dehradun, in Sessions Trial No.49 of 1989, State Vs. Kailash & others, whereby the learned Additional Sessions Judge has acquitted the Respondent Nos. 1 to 3 namely Kailash, Vijai Prakash alias Bijji and Arun alias Gullu respectively for an offence punishable u/s 302 r/w 34 of Indian Penal Code, 1860 (hereinafter to be referred as I.P.C.)

2. Respondent No.3 Arun alias Gullu is reported to have died during the pendency of the appeal. C.J.M.,

stands abated. Respondent No.4 Kaloo alias Ramesh had died during the pendency of trial, hence the case against him was abated during trial.

3. In brief the prosecution case is that on 04.12.1987 in the morning, Brahmanand went to village Mothrowala for seeing his ailing daughter. Then the persons from his street (Mohalla) came and informed that his son Ramesh was shot dead at about 11:00 A.M. at Kanwali Road near Bindal river on 4.12.1987 and his dead body was lying there. Brahmanand reached on the spot and saw that the dead body of his son was lying in the river. Some persons told him that Kailash, Kaloo, Vijji and Gullu had fired upon his son. This murder took place at Kanwali road near Bindal Bridge, P.S. Kotwali, Dehradun. Brahmanand gave a written report at P.S. Kotwali, Dehradun and FIR Ex.Ka -1 was lodged at P.S.D. Kotwali, District Dehradun. On the basis of this FIR, Constable Suresh Tyagi prepared a Chik FIR i.e. Ex.Ka-19 and the entry was made in the G.D., the cope of G.D. is Ex.Ka-14 This report was lodged in the police station at 12:15 P.M. on 4.12.1987 and the distance of the police station from the place of occurrence as shown in the FIR is 3 Kms. The investigation was entrusted to Sub-Inspector Y.P. Singh who has started the investigation on the same day i.e. on 4.12.1987. Near the dead body, he has recovered 2 Khoka cartridges and from the possession of the deceased Ramesh, one country made pistol 12 bore and 4 live cartridges .38 Bore were recovered. The Fard in this regard was prepared on the spot, i.e. Ex.Ka-3. From the pocket of the shirt of the deceased Ramesh, a note of Rs.5/- was recovered

also recovered by the I.O. and a Fard was prepared on the spot, that Fard is Ex.Ka-6. The inquest report was prepared by the I.O. on 4.12.1987, that inquest report is Ex.Ka -7 Ex.Ka-8 is the photographs in which the injuries were shown along with the inquest report. Ex.Ka-9 was also prepared at the time of preparation of the inquest report Ex.Ka-10 is the letter written by the I.O. to the R.I. Police Line, Dehradun. Ex.ka 11 is the letter written by the I.O. to the C.M.O., Doon Hospital, Dehradun requesting for conducting the post-mortem of the dead body. Ex.Ka-12 is the specimen of seal. Ex.Ka -13 is also a letter written by the I.O. to CMO, Dehradun. Ex.Ka-15 is the copy of the G.D. dated 4.12.1987 Report No.28 at 9:00 P.M. Ex.Ka-16 is also a copy of G.D. dated 4.12.1987 at 9:30 A.M. Report No. 16. Ex.ka.-17 is also a copy of the G.D. dated 4.12.1987 at 10:00 P.M. Reprot No.29. Ex.K-18 is the map prepared by the I.O. of the place of occurrence. Dr. B.C. Ramola conducted the post-mortem of the deceased on 5.12.1987 at 2:45 P.M., the post-mortem report is Ex.Ka-2. During the investigation, the I.O. has recorded the statements of the witnesses and after completing the investigation, he has submitted the charge sheet against the respondents, that charge sheet is Ex.K-20 in the court of CJM, Dehradun.

4. The CJM, Dehradun has committed the case to the court of Sessions after complying with the provision u/s 207 Cr.P.C. on 09.03.1989.

5. The learned Additional Sessions Judge, Dehradun has framed the charge against the Respondent Nos. 1 and 2

and explained to Respondent No. 3 who also pleaded not guilty and claimed to be tried.

6. The prosecution in order to prove its case produced P.W. 1 Brahmanand, P.W. 2 Head constable Raj Kumar, P.W.3 Ganga Ram, P.W.4 Dr. B.C. Ramola and P.W. 5 S.I. Y.P. Singh. Thereafter, the statements of the respondents were recorded u/s 313 Cr.P.C. They have denied the allegations made against them however they have not examined any witness in support of their case in defence but they had filed a copy of the judgment and order dated 22.11.1988 passed by Additional Sessions Judge, Dehradun in S.T. No.102 of 1987, State Vs. Kaloo and Gullu, whereby the Kaloo alias Kalia and Arun Kumar alias Gullu were acquitted for the charge u/s 302 and 307 IPC . After appreciating the evidence and hearing learned counsel for the parties, The learned Additional Sessions Judge has acquitted the Respondents for the offence punishable u/s 302 r /w 34 IPC by his order dated 4.4.1990 Against the said order dated 4.4.1990 the state has come up in appeal before this Court .

7. We have heard Sri Amit Bhatt. Lerner Additional G.A. for the State and Sri Diwakar Chamoli, learned amicus curiae for the Respondent Nos. 1 and 2 and perused the entire material available on record.

8. In Support of its case. The prosecution has examined as many as five witnesses.

9. P.W.1 is The Brahmanand who has stated in his

He went to the spot and saw the dead body lying there. Many persons were also collected there. They had told him that Kallu, Kailash, Bijji and Gullu had fired upon the deceased. He has further stated that for the above said incident, he had lodged the FIR in The P.S. Kotwali, Dehradun. The FIR is Ex.Ka-1. In the cross-examination, he has stated that Kanwali village is in the distance of 7-8 Kms. from Mothrowala. He has also stated that the Naresh had come to inform him about the murder of his son. He had further stated that the Daroga had told him before lodging the FIR in the police station that it is general rumor that the respondents have killed the deceased Ramesh.

10. P.W.2 is the Head Constable Raj Kumar. He has stated that he went from the out post Laxman Chowk for serving the summon and other documents. When he reached at Bhatda Mohalla near the river, He heard the noise of fire. When he reached on the spot, he saw the respondents and the deceased. All the respondents were armed with country made pistol. Bijji and Kaloo had made 2-3 fires on Ramesh due to which he fell down there. He chased the respondents but they could not be traced. He had chased the respondents up to Yamuna Colony but he could not get success to catch hold of them. When he returned to the place of occurrence, then some persons had collected there. The bank duty employees, constable Ram Kumar and Baleshwar Singh also reached on the spot. He has stated in his cross-examination that the respondents were named in the murder of Hemendra and since then they were known to him. He has further stated that the respondents were named in the murder of Hemendra and since then they were known to him.

Y.P. Singh on the next day of the incident. He has further stated that he had chased the scooters of the respondents upto $\frac{1}{2}$ Kms. To $\frac{3}{4}$ Kms. And for that, he took 1- 1 $\frac{1}{2}$ hours. He had further stated that he has not informed in the police station about the Incident and he has not made any entry in the G.D. about the said incident.

11. P.W.3 is Ganga Ram who has stated that he did not know anything about the incident. He was declared hostile by the prosecution, as he has not supported the case of the prosecution.

12. P.W. 4 is Dr. B.C. Ramola. He has stated that on 5.12.1987, he was posted as Medical Officer and on that day at 2:45 P.M., he had conducted the post-mortem of the deceased Ramesh and he had found the following ante-mortem injuries on his person:-

1. *Gun shot entry wound oval shape 3 cm x 2 cm. into brain cavity deep on the left side of the head mastoid region with blackening and burning hairs and charring around the wound and scalp with brain matter oozing out directly posteriorly.*
2. *Lacerated wound 2 cm x 1 cm on the upper part of left ear with blackening and charring of the margins.*
3. *gun shot entry oval 0.05 cm. on the right side face just in front of the trageous of right ear with blackening and charring around the margins.*
4. *contusion 0.25 cm x 0.25 cm. with blackening on right side face 3cm. below injury no.3.*

INTERNAL EXAMINATION

Head: Laceration with blackening and charring sobcutaneous tissues beneath the injury no. 1 on left side head with fracture of the timpo paratal boen with laceration of meningeal memberance and left hemisphere brain middle part directing posteriorly, piarasing the occipital loew left side piarcing the inner table occipatal bone and impacted in it three pieces gun shot pillates. One piece gun shot

Dr. B.C. Ramola has stated in the cross-examination that the deceased could receive these injuries if he would have fired himself. All the injuries could not be self-inflicted injuries.

13. P.W5 is Yogendra Pal Singh, S.I. who is the investigating Officer of the case, He has stated that on 4.12.1987, he was the IN-charge Chowki, Laxman Chowk, P.S. Kotwali. The investigation of this case was entrusted to him. During the investigation, he has recorded the statements of the witnesses and has inspected the place of occurrence. From the spot, he has recovered one country made pistol 12 Bore, 2 Khoka cartridges and 4 live cartridges. 38 Bore were recovered on the place of occurrence. The Fard in this regard was prepared on the spot, i.e. Ex.Ka-3. From the pocket of the shirt of the deceased Ramesh a note of Rs. 5/- was recovered by the police and for that a Fard was prepared on the spot, i.e. Ex.Ka-4. The plain earth and the blood stained earth was taken by him from the spot and a Fard was prepared on the spot, i.e. Ex.Ka-5. One scooter and a HMT Wrist watch was also recovered by him near the dead body which were taken into the possession by the police. A Fard was prepared on the spot, that Fard is Ex.Ka-6. The inquest report was prepared by him, that inquest, report is Ex.Ka-7. The map of the dead body i.e. Ex.Ka-8, Challan of dead body Ex.Ka-9, report to the R.I. Ex.Ka-10, Reprot to CMO Ex.Ka-11, Specimen of seal Ex.Ka-12, letter to CMO Ex.Ka-13 were prepared by him on the spot. Hew has also proved the copy of G.D. No. 48 at 12:15 P.M. dated 4.12.1987 which was prepared by Suresh Tyagi, Head Constable, that copy is Ex.Ka-14. He has also proved the G.D. Ex. Ka-15, Ex. Ka-16 and Ex. Ka-17. He has also proved the

examination. he has stated that he has also record the statement of the Raj Kumar on the nest day of the date of incident i.e. on 05.12.1987 .

14. Thereafter. The statements of the respondents were recorded u/s 313 Cr. P.C. They denied the allegations made against them and stated that they were falsely implicated due to enmity.

15. Sri Amit Bhatt. Learned Additional G.A. for the state/appellant has argued that the only evidence against the respondents is the statement of P.W. 2 Head Constable. Raj Kumar. Sri. Diwakar Chamoli learned amicus curiae for the respondents has rebutted the argument of learned Addl. G.A. and has submitted that the statement of P.W. 2 Head Constable Raj Kumar is not believable. Natural and reliable and it creates a doubt in the prosecution story.

16. As per the evidence discussed above. P.W.1 is Brahmanand who is the father of the deceased. He is not the eyewitness and has not seen the incident. P.W.3 is the Ganga Ram who was the independent eyewitness but he has not supported the case of the prosecution and has stated that he did not know who has killed the deceased Ramesh and he was declared hostile by the prosecution. P.W.4. is Dr. B.C. Ramola who is the formal witness and has conducted the post-mortem of the deceased Ramesh. P.W. 5 S.I. Y.P. Singh is the Investigating Officer of the case who is also the formal witness and who has stated that he has recorded the statement of the Constable Raj Kumar on the next day of the incident i.e. on 05.12.1987

be said to be believable, trustworthy and reliable due to the following reasons:-

- A. He has not informed in the police station about the incident and he has not made any entry in the G.D. when he had come back to the police station about the said incident.
- B. He has not tried to save the life of the deceased Ramesh which is also not a normal behavior of a person in the facts and circumstances of this case.
- C. He had chased the respondents up to $\frac{1}{2}$ $\frac{3}{4}$ Kms and for that he took 1- 1 $\frac{1}{2}$ hours. The respondents were running on a scooter and he was chasing by running behind them. This behaviour and conduct of the witness P.W.2 Raj Kumar in the facts and circumstances of this case is also not a natural and normal conduct when a deceased was lying in an injured condition on the place of occurrence.
- D. The statement of this witness P.W.2 Raj Kumar was recorded by the I.O.P.W.5 S.I. Y.P. Singh on the next day of the incident i.e. 05.12.1987 which also shows that this witness was not available on the same day for recording the statement u/s 161 Cr.P.C. as the Investigating Officer had reached on the spot on the same day after the incident. This also shows that this witness was not present on the date of the occurrence and he had not seen any incident.

18. From the above-narrated facts, the presence of the said witness P.W.2 Head Constable, Raj Kumar on the place

19. The prosecution has not examined any independent eyewitness except Ganga Ram, though the place of occurrence is near about the Abadi. This also shows a doubt in the prosecution case. By this standard, when the prosecution case rests mainly on the sole testimony on an eyewitness, it should be wholly reliable. When the evidence of a witness is in conflict with other evidence, then the view taken by the trial court that it would be unsafe to convict the respondents on his sole testimony cannot be stated to be unreasonable. It is also settled law that when the two views are possible, then the view taken by the trial court favourable to the accused must be accepted.

20. On the basis of the evidence discussed above, we are of the considered view that when one view is also possible as the view taken by the trial court, then as per the settled law, the view taken by the trial court must be accepted.

21. Hence, we are in full agreement with the view taken by the trial court on the basis of the evidence discussed above acquitting the Respondents for the above-said charge. The view taken by the learned trial court is perfectly justified and correct and as per law and we are not inclined to interfere with the said judgment and order dated 04.04.1990 passed by Additional Sessions Judge, Dehradun and we hereby confirm the judgment and order dated 04.04.1990 passed by learned Additional Sessions Judge, Dehradun.